

**From:** Rick Halpert  
**To:** Microsoft ATR  
**Date:** 1/23/02 12:18pm  
**Subject:** Microsoft Settlement

I disagree with the settlement in its current form. For the following reasons:

Microsoft has used both restrictive licenses and intentional incompatibilities to discourage users from running Windows applications on Windows-compatible competing operating systems. Two examples are given below.

1. Microsoft uses license terms which prohibit the use of Windows-compatible competing operating systems

MSNBC (a subsidiary of Microsoft) offers software called NewsAlert. Its EULA states

"MSNBC Interactive grants you the right to install and use copies of the SOFTWARE PRODUCT on your computers running validly licensed copies of the operating system for which the SOFTWARE PRODUCT was designed [e.g., Microsoft Windows(r) 95; Microsoft Windows NT(r), Microsoft Windows 3.x, Macintosh, etc.]. ..."

Only the Windows version appears to be available for download. Users who run competing operating systems (such as Linux) which can run some Windows programs might wish to run the Windows version of NewsAlert, but the EULA prohibits this.

MSNBC has a valid interest in prohibiting use of pirated copies of operating systems, but much narrower language could achieve the same protective effect with less anticompetitive impact. For instance,

"MSNBC Interactive grants you the right to install and use copies of the SOFTWARE PRODUCT on your computers running validly licensed copies of Microsoft Windows or compatible operating system."

2. Microsoft created intentional incompatibilities in Windows 3.1 to discourage the use of non-Microsoft operating systems

An episode from the 1996 Caldera v. Microsoft antitrust lawsuit illustrates how Microsoft has used technical means anticompetitively.

Microsoft's original operating system was called MS-DOS. Programs used the DOS API to call up the services of the operating system. Digital Research offered a competing operating system, DR-DOS, that also implemented the DOS API, and could run programs written for MS-DOS. Windows 3.1 and earlier were not operating systems per se, but rather middleware that used the DOS API to interoperate with the operating system. Microsoft was concerned with the competitive threat posed by DR-DOS, and added code to beta copies of Windows 3.1 so it would display spurious and misleading error messages when run on DR-DOS. Digital Research's successor company, Caldera, brought a private antitrust suit against Microsoft in 1996. (See the original complaint, and Caldera's consolidated response to Microsoft's motions for partial summary judgment.) The judge in the case ruled that

"Caldera has presented sufficient evidence that the incompatibilities

alleged were part of an anticompetitive scheme by Microsoft."

That case was settled out of court in 1999, and no court has fully explored the alleged conduct.

The concern here is that, as competing operating systems emerge which are able to run Windows applications, Microsoft might try to sabotage Windows applications, middleware, and development tools so that they cannot run on non-Microsoft operating systems, just as they did earlier with Windows 3.1.

The PFJ as currently written does nothing to prohibit these kinds of restrictive licenses and intentional incompatibilities, and thus encourages Microsoft to use these techniques to enhance the Applications Barrier to Entry, and harming those consumers who use non-Microsoft operating systems and wish to use Microsoft applications software.

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